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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT/CROSS-APPELLANT

v.

ROBERT A. BROWN, APPELLANT/CROSS-RESPONDENT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE SALVATORE F. COZZA

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury on the definition and elements of kidnapping.
2. The trial court erred by entering judgment on the jury verdict finding defendant guilty of First Degree Murder based upon the commission or attempted commission of first degree kidnapping.
3. The evidence was insufficient to convict the defendant of felony murder.
4. The trial court erred by including WPIC 25.01 in its instructions to the jury.
5. Defendant received ineffective assistance of counsel based upon the failure to object to the trial court's instructional errors.
6. The cumulative errors deprived defendant of a fair trial.

II.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court erred in ordering that the firearm enhancements be served concurrently.

### III.

#### ISSUES PRESENTED

1. Did the inclusion of the uncharged alternative means of committing first degree kidnapping deprive defendant of due process?
2. Should the felony murder conviction be reversed when the predicate felony is reversed?
3. Was there sufficient evidence to support the conviction of First Degree Felony Murder?
4. Did the inclusion of WPIC 25.01 deprive defendant of a fair trial by misstating the law?
5. Did Counsel's failure to object to the giving of erroneous instructions to the jury constitute ineffective assistance of counsel?
6. Does cumulative error require reversal of the convictions and remand for a new trial?
7. May firearm enhancements be imposed concurrently?



#### IV.

##### STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case for purposes of this appeal with the following additions.

Defendant made the following admissions to law enforcement investigators after being fully advised of his constitutional rights. Defendant owned the trailer in which Mr. Esquibel was held. The trailer was located on defendant's property behind his home. Defendant knew that Mr. Esquibel had been held inside the trailer all day and night while they used threats and physical intimidation to scare him into believing that they were going to kill him if he did not return their money. RP 522. Defendant heard the nailing gun being shot off inside the trailer and corresponding screaming. RP 522, 652. Defendant was asked for jumper cables. RP 523. He knew that Esquibel was being tortured and told that his body was going to be wrapped in carpet to keep him from getting blood in the trailer and for disposal. RP 523-24. When Esquibel claimed connections with Mexican gangsters, defendant left the trailer to check the story out. RP525-26, 653-54. Defendant was advised that Esquibel was not connected to Mexican gangsters, in fact, Mr. Esquibel was described as a thief who had also stolen money and drugs from the gangsters, so no one would miss him if he died. RP 527. When the situation appeared that

the threats were getting serious, defendant began to distance himself from the trailer. RP 529. Defendant knew Esquibel was not in the trailer voluntarily. RP 529. Defendant admitted holding the gun on Esquibel and assaulting him in the head while guarding Esquibel during Burnham's absence to get Kosewicz to handle Esquibel. RP 655, 658-60. Burnham then handed defendant the gun and defendant told Esquibel that he was not going anywhere. RP 659-660. Defendant told Esquibel to shut up when he tried to talk. RP 660. Defendant left the trailer when Burnham returned with Kosewicz, but continued to monitor the situation from his house, so he knew when the plan turned to killing Esquibel. RP 657. Defendant heard Burnham say that they should kill Esquibel. RP 657.

The jury acquitted defendant of premeditated murder and conspiracy to commit first degree kidnapping while convicting him of first degree felony murder and first degree kidnapping. At sentencing, the trial court concluded that the felony murder and kidnapping convictions merged for purposes of sentencing. The trial court imposed the firearm enhancements corresponding to each conviction, then concluded that the enhancements also merged. Defendant appealed his convictions, the State appealed the concurrent imposition of the firearm enhancements.

V.

ARGUMENT

A. THE TRIAL COURT PROPERLY INSTRUCTED  
THE JURY.

Generally, the failure to object to a trial court's jury instruction precludes appellate review. *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor his counsel objected to the jury instructions that he now contends were erroneous. Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by a test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). (Emphasis added). The defendant has not satisfied the threshold burden that the trial court committed a manifest error which affected a constitutional right and is not entitled to appellate review thereof at this point.

Defendant claims the trial court committed error of constitutional magnitude instructing the jury by giving: (1) a definition of "homicide;"

(2) a definition of first degree kidnapping; and (3) the elements of first degree kidnapping. Jury instructions satisfy the constitutional demands of a fair trial, when read as a whole, the instructions provide the jury with the applicable law, are not misleading, and permit the defendant to present his theory of the case. *State v. Prado*, 144 Wn. App. 227, 241, 181 P.3d 901 (2008) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. Dana*, 73 Wn.2d 533, 536-37, 439 P.2d 403 (1968)). Erroneous jury instructions are subject to *de novo* review by the appellate court. *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007).

1. The Court Exercised Its Discretion Defining Homicide For The Jury Based Upon Defendant's Admissions And Case Theory.

It is a matter of judgment and trial court discretion whether the words used in the jury instructions require further definition. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Jury instruction No. 5 defined the term homicide as "the killing of a human being by the voluntary act, procurement, or failure to act of another and is either murder..." CP 347. Instruction No. 5 is based upon WPIC 25.01 and provides the approved definition. Defendant properly points out that the WPIC Committee has determined that this instruction has been

withdrawn. Nevertheless, the Committee's comments explain that such an instruction is no longer necessary based upon the Legislative evolution of the murder statute. The WPIC Committee did not opine that the instruction constituted an erroneous statement of the law, merely that it no longer provides the jury with any necessary information. See 11Wash.Prac., Pattern Jury Instr. Crim. WPIC 25.01 (3<sup>rd</sup> Ed). Here, the trial court gave the basic package WPIC instructions available with respect to murder. The trial court determined that the term "homicide" needed further definition for the jury in light of the evidence and defendant's claim that he was merely present and did not participate in the kidnapping or the murder to cover up the kidnapping. Arguably, the defense did not object to the inclusion of the definition because it had no effect on defendant's theory of the case that there was insufficient evidence of his knowing participation in the planning of the kidnapping to render him criminally liable for the murder of Mr. Esquibel.

A jury is presumed to follow the law as instructed by the trial court. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Here, the instructions accurately provided the applicable law, did not mislead, and afforded Mr. Brown the basis upon which to argue his theory of the case. The record reflects that the jury considered defendant's theory of the case prior to entering guilty verdicts of the felony murder and kidnapping

charges. The jury acquitted defendant of the premeditated murder and conspiracy to commit kidnapping charges. The reasonable inference from the verdicts is that the jury carefully followed the trial court's instructions and rendered appropriate verdicts based upon the evidence. Clearly, the inclusion of the definition of homicide did not prevent defendant from arguing his theory of the case and did not mislead the jury.

2. The Court Properly Instructed The Jury On The Definition And Elements Of First Degree Kidnapping In The Context Of The First Degree Felony Murder Charge.

Defendant contends that he was deprived of due process by the trial court providing the jury the means to find him guilty based upon an uncharged alternative of first degree kidnapping. The United State and Washington State constitutions mandate that the jury be instructed regarding all essential elements of the crime charged. *State v. O'Donnell*, 142 Wn. App. at 322. Here, the trial court instructed the jury regarding the definition and elements of first degree kidnapping based on the charging language in the amended information. The amended information charged the defendant with first degree premeditated murder with an alternative of first degree felony murder, first degree kidnapping, and conspiracy to commit first degree kidnapping. The trial court was legally

obligated to instruct the jury with respect to the applicable law based upon the charged offenses and the evidence produced.

The evidence before the jury was sufficient for the jury to conclude that the defendant had acted in a manner that satisfied both alternative means of committing first degree kidnapping. The trial court was legally obligated to provide the jury with an instruction that defined first degree kidnapping using both alternative means for purposes of the first degree felony murder charge. To convict someone of felony murder, the State must prove that he committed or attempted to commit the named predicate felony and in the course of or furtherance of such crime or in immediate flight therefrom, he, or another participant, caused the death of a person other than one of the participants. RCW 9A.32.030(1)(c).

3. A Felony Murder Conviction Is An Independent Crime That Does Not Require A Separate Conviction Of The Predicate Felony To Be Valid.

A Felony murder count does not list the elements of the predicate felony offense because in the felony murder context, while the underlying crime is an element of felony murder, the defendant is not actually charged with the underlying crime. Rather, the underlying crime functions as a substitute for the mental state that the State would otherwise be required to prove. *State v. Bryant*, 65 Wn. App. 428, 438, 828 P.2d 1121,

*review denied*, 119 Wn.2d 1015 (1992). “Washington courts have long held that the elements of the underlying felony are not elements of the crime of felony murder.” *Bryant*, 65 Wn. App. at 438 (*citing State v. Anderson*, 10 Wn.2d 167, 180, 116 P.2d 346 (1941); *State v. Ryan*, 192 Wash. 160, 164-65, 73 P.2d 735 (1937); *State v. Fillpot*, 51 Wash. 223, 228, 98 P. 659 (1908)). Accordingly, at trial the State can prove the underlying crime by alternative means. *State v. Medlock*, 86 Wn. App. 89, 101, 935 P.2d 693, *review denied*, 133 Wn.2d 1012 (1997). Still, the State must prove the elements of the underlying felony beyond a reasonable doubt. *State v. Bryant*, 65 Wn. App. at 438 n. 11. Here, the trial court properly instructed the jury with respect to first degree kidnapping for purposes of rendering a verdict regarding the charge of first degree felony murder.

Defendant claims that the trial court erroneously instructed the jury by including the uncharged alternative means of committing first degree kidnapping in the elements instruction with regard to the separately charged crime of first degree kidnapping. Assuming, *arguendo*, that defendant’s position is correct, the error was harmless.



4. Assuming, *Arguendo*, That The Wording Of The Kidnapping Elements Instructions Was Erroneous, The Error Was Harmless Given The Facts Of This Case.

If the court's inclusion of the alternative means of committing kidnapping was an error of constitutional magnitude, a new trial is not necessarily the proper remedy.

Due process requires that the jury be instructed on all the essential elements of the charged crime. Instructions that omit essential elements thereby relieve the State of its burden of proving each element beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999). Here, the targeted instruction included more elements than was required by the charging pleading.

There is a limited class of fundamental constitutional errors that are so intrinsically harmful that they necessitate automatic reversal without consideration of the effect on the outcome of the trial. *Id.* When such errors are involved, the entire trial process is rendered fundamentally unfair. *Neder, supra*. Such errors are "structural" in nature and include: total denial of counsel, proceeding before a biased trial judge, racial discrimination in jury selection, denial of self-representation, and denial of a public trial. *State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005). These "structural errors" defy review because each

deprives the defendant of the basic protections without which a criminal trial cannot reliably serve its function as a means for determination of guilt or innocence. *Neder*, 527 U.S. at 8. When a structural error is involved the resulting criminal punishment cannot be regarded as fundamentally fair. *Id.*, at 8-9.

The Supreme Court held that the omission of an essential element from the jury instructions is not a structural error. *Id.* Nevertheless, it is an error of constitutional magnitude which necessitates review. The court reasoned that such cases are to be reviewed under the harmless error doctrine. *Id.* An instruction that omits an element does not necessarily render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Neder, supra*. Omitting an element can be analogized to improperly instructing the jury on the element itself, an error that is subject to harmless error analysis. *Id.*

An error of constitutional magnitude does not require reversal if the error is shown to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967); *State v. Wall*, 52 Wn. App. 665, 763 P.2d 462 (1988); *State v. Hoffman*, 116 Wn.2d 51, 96-97, 804 P.2d 577 (1991). The United States Supreme Court has made it clear that the failure to fully instruct a jury on all elements of an offense "does not necessarily render a criminal

trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. at 9. Under *Neder*, a defendant's Sixth Amendment right to a jury is violated when a jury is not fully instructed on all the elements of the offense, but such an error can be deemed harmless beyond a reasonable doubt. *Neder*, 527 U.S. at 9-10.

The Washington Supreme Court adopted the holding in *Neder* in *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). In *Brown*, a jury instruction misstated the law of accomplice liability. *Id.* at 338. The court in *Brown* followed *Neder* in reasoning that "not every omission or misstatement in a jury instruction relieves the State of its burden" so as to require reversal. *Id.* at 339. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Brown*, 147 Wn.2d at 340 (*citing Neder* 527 U.S. at 9). Under *Brown* and *Neder*, a "jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has relieved the State of its burden to prove each element of the case." *Id.* at 344.

The test to determine whether such constitutional error is harmless is "whether it appears beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained." *Id.* at 341, (quoting *Neder*, 527 U.S. at 15). In performing this analysis, the court must determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19. "If, at the end of the examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." *Neder*, 527 U.S. at 19. On the other hand, "[w]hen applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." *Brown*, 147 Wn.2d at 341 (citing *Neder*, 527 U.S. at 18).

The *Neder* harmless error analysis applies here. The contested issue at trial was whether the defendant premeditated the murder of Mr. Esquibel, or was it in furtherance of the commission of first degree kidnapping. The jury verdicts accepted and rejected the parties' respective case theories since the verdicts found defendant not guilty of premeditated first degree murder and conspiracy to commit kidnapping, yet guilty of first degree felony murder and guilty of first degree kidnapping. The verdicts reflect careful consideration of the parties' arguments in light of

the evidence and the court's instructions. Defendant argued that there could be no conviction for conspiracy because there was no evidence that defendant entered an "agreement" with the other participants to kidnap and kill Mr. Esquibel. Nevertheless, defendant confessed that:

Mr. Esquibel was being held in the trailer defendant owned, located behind his house, on his property; he knew that Burnham and Hritsco had hunted down, caught, and brought Mr. Esquibel back to the trailer against his will because of his drug debt; they were holding him to extract the money owed in any way possible, including intimidation; he knew that Mr. Esquibel was being held against his will in the trailer because he saw him stripped of his clothes, bound, threatened and assaulted; he participated in holding Mr. Esquibel in the trailer at gun point and assaulted him when he asked to be released; he knew that if Esquibel could not come up with the money owed that they were going to kill him and dispose of the body; he provided the jumper cables that were used to hog tie Mr. Esquibel for transport to the scene of his murder.

RP 521-30, 650-660.

There was no question that the first degree kidnapping and felony murder began when the defendant provided the location and some of the means by which Mr. Esquibel's kidnapping and eventual murder were accomplished. Defendant confessed to assaulting and intimidating Esquibel of his own volition when he was left to guard him during Burnham's absence. There is no question that the evidence supports the verdict that the murder was committed "in the course of or in furtherance of" the first degree kidnapping "or in immediate flight therefrom." Any

error in instructing the jury was harmless beyond a reasonable doubt. Accordingly, it is uncontroverted that the jury accepted the defendant's confessions to his participation in the kidnapping and murder thereafter.

5. Defendant Has Not Established That The Court Improperly Instructed The Jury On Accomplice Liability.

The trial court instructed the jury regarding the law of accomplice liability. Defendant claims that accomplice liability does not extend to someone who fails to come to the aid of another. The record reflects that the defendant was more than a mere bystander. As previously noted, the defendant provided the means to secret Mr. Esquibel, actively participated in the kidnapping by assaulting and holding him at gunpoint. Defendant minimized his participation to the jury by arguing that he only hit Mr. Esquibel once in the head and hid the gun under a towel. Nevertheless, the defendant's actions prevented Mr. Esquibel from even trying to effectuate an escape during at least one period when Mr. Burnham was absent from the trailer. Finally, defendant provided the means by which Mr. Esquibel was finally secured for transport to the scene of his murder, the jumper cables. It is noteworthy that the evidence of defendant's participation was primarily the result of his confessions to law enforcement. As defendant noted in his appellate brief, an accomplice

need not be present at the time the crime is committed as long as his actions facilitated the crime. Defendant has failed to establish that the jury convicted him for his failure to act because the equally compelling and reasonable inference from the jury verdicts is that the jury convicted him based upon the actions he took as opposed to those actions that he chose not to take.

B. THERE WAS SUFFICIENT EVIDENCE TO  
SUPPORT THE JURY'S VERDICT FINDING  
THE DEFENDANT GUILTY OF FIRST DEGREE  
FELONY MURDER.

Defendant argues that the evidence of his complicity in Mr. Esquibel's kidnapping and murder was insufficient to support the jury's verdict finding the defendant guilty of first degree felony murder. Evidence is sufficient to support a conviction if, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. *State v. Hendrickson*, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). The elements of a crime may be established by either direct or circumstantial evidence, one type being no more valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Issues regarding conflicting testimony and credibility of witnesses are for the

finder of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict someone of felony murder, the State must prove that he committed or attempted to commit the named predicate felony and in the course of or furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants. RCW 9A.32.030(1)(c). Defendant contends that the trial court's instructional error with regard to kidnapping also constitutes instructional error as to the first degree felony murder charge. Defendant claims that the jury cannot find defendant guilty of the felony murder charge without also finding him guilty of the predicate offense. Felony murder counts do not list the elements of the predicate felony in the Information because in this context, while the underlying crime is an element of felony murder, the defendant is not actually charged with the underlying crime. Rather, the underlying crime functions as a substitute for the mental state that the State would otherwise be required to prove. *State v. Bryant*, 65 Wn. App. at 438. Accordingly, elements of the underlying felony are not elements of the crime of felony murder. *State v. Medlock*, 86 Wn. App. at 101. At trial, the State can prove the underlying crime by alternative means. *State v. Medlock*, 86 Wn. App. at 101. Still, the State must prove the elements of the underlying felony



beyond a reasonable doubt. *State v. Bryant*, 65 Wn. App. at 438 n. 11. Defendant contends that no evidence connects him to Mr. Esquibel's death.

Here, the evidence clearly demonstrated that defendant knew of the "taxing" of Esquibel for a debt owed to a known drug dealer. Defendant admitted to Sheriff's Detectives that the drug dealer, Burnham was living in defendant's trailer, located behind his house on his property. Burnham and Hritsco had hunted Esquibel down to "tax" him for stealing \$800. Defendant was in and out of the trailer in which Esquibel was being held against his will numerous times during the holding and torture. Defendant held a gun on Esquibel, struck him in the head and ordered him to shut up when he pleaded with the defendant. Defendant asked Esquibel where the money was during the kidnapping. The defendant was not forced to participate in the "taxing" and did nothing to either stop or disassociate himself from the actions taken against Mr. Esquibel. The evidence before the jury was that defendant willingly participated in the assault, abduction and eventual murder of Mr. Esquibel. Accordingly, there was sufficient evidence to support the jury finding defendant complicit in the kidnapping and murder of Mr. Esquibel.

C. DEFENDANT WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY THE DECISION NOT TO OBJECT TO THE COURT'S INSTRUCTIONS.

A defendant must establish that the attorney's performance was deficient and that the defendant was prejudiced by that deficiency to establish ineffective assistance of counsel. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show deficient performance. *Id.* Prejudice is established where the defendant shows that but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d at 77-78. Here, the inquiry focuses upon whether the trial counsel's failure to object to the trial

court's giving three jury instructions can be characterized as illegitimate trial strategy or tactics. At trial, defendant argued that he was merely a bystander without any foreknowledge of what was to come. Read as a whole, the jury instructions supported defendant's theory of the case, did not mislead the jury, and properly advised the jury of the applicable law. There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's trial counsel was ineffective. Quite the contrary is evident from the record. As noted, the court was required to instruct the jury on the definition of kidnapping to facilitate its consideration of the felony murder charge. Defendant's Counsel had no valid basis to object to the giving of such instructions with respect to the felony murder charge. Nevertheless, the jury carefully considered the evidence and acquitted the defendant of the premeditated murder and conspiracy charges. The fact that the jury weighed the evidence and did not find defendant's theory of the case credible does not establish that his trial counsel was ineffective.

D. DEFENDANT HAS NOT ESTABLISHED THAT  
CUMULATIVE ERROR DEPRIVED HIM OF A  
FAIR TRIAL.

Defendant contends that the numerous errors that he claims were part and parcel of his trial, though insufficient to warrant reversal

individually, should be added together to justify reversal. Application of the doctrine of cumulative errors is limited to instances when there have been several trial errors that alone may not be sufficient to justify reversal, but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Generally, a conviction is reversed pursuant to this doctrine when review shows that cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835, clarified by 123 Wn.2d 737, 870 P.2d 964 (1994). Nevertheless, the defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *Id.* Where there was no prejudicial error, there can be no cumulative error that deprived a defendant of a fair trial. *State v. Saunders*, 120 Wn. App. 800, 826 P.2d 1194 (2004). Here, defendant formally assigns five errors, yet defendant's appeal is primarily based upon a claim of instructional error and insufficient evidence. The ineffective assistance of counsel claim is based upon defendant's contention that counsel failed to object to the alleged instructional errors. Defendant identifies two instructional errors, yet fails to show how the outcome of the trial was affected thereby. Defendant bears the burden of demonstrating that the errors affected the outcome of the trial. The jury acquitted defendant of the premeditated murder and conspiracy to commit

first degree kidnapping despite the alleged errors. Assuming defendant considers the acquittals were well-reasoned verdicts, he has failed to satisfy his burden of showing how the alleged errors prejudiced his trial.

E. DEADLY WEAPONS ENHANCEMENTS CANNOT  
BE RUN CONCURRENTLY PURSUANT TO  
LEGISLATIVE STATUTORY PROVISIONS.

The trial court properly imposed deadly weapons enhancement for each of the two convictions. However, the trial court erred by imposing the two deadly weapon enhancements to be served concurrently.

This issue has been firmly decided. The statute is plain and dictates clear: "...enhancements under this section are mandatory, shall be served in total confinement, and shall run *consecutively* to all other sentencing provisions, including other firearm or deadly weapon enhancements, . . ." RCW 9.94A.510(3)(e).

The Washington State Supreme Court firmly held that deadly weapon enhancements are to run consecutively and multiple weapon enhancements are possible in one crime. *State v. DeSantiago*, 149 Wn.2d 402, 68 P.3d 1065 (2003). The trial court *must* impose consecutive deadly weapon enhancements.

Plainly, the trial court erred in imposing concurrent deadly weapon enhancements and this case must be remanded to correct the trial court's sentencing error.

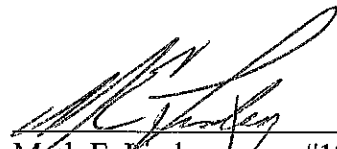
VI.

CONCLUSION

For the reasons stated, the convictions and sentence should be affirmed.

Respectfully submitted this 17<sup>th</sup> day of September, 2009.

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